IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DEBRA EDMOND, PLAINTIFF

v. Civil Action No: 3:99CV3-A

KENNETH S. APFEL, Commissioner of
Social Security, DEFENDANT

MEMORANDUM OPINION

This case involves an application pursuant to 42 U.S.C. § 405(g) for judicial review of the decision of the Commissioner of Social Security denying the application of plaintiff Debra Edmond for supplemental security income (SSI) benefits under Title XVI. The district court's jurisdiction over plaintiff's claims rests upon 28 U.S.C. § 1331. In accordance with the provisions of 28 U.S.C. § 636(c), both parties consented to have a United States Magistrate Judge conduct all proceedings in this case, including an order for entry of a final judgment. Therefore, the undersigned has authority to issue this opinion and the accompanying final judgment.

The plaintiff was born on May 11, 1957 and attended school through the seventh grade. Her past relevant work was as a cook's helper. Plaintiff filed her application for SSI on October 29, 1995, alleging a disability onset date of October 8, 1995. Plaintiff contends that she is disabled due to reduced intellectual functioning, seizure disorder, depression and a passive dependent/passive aggressive personality. Plaintiff's requests for benefits were denied at the initial and reconsideration stages, and she sought timely review from an administrative law judge

(ALJ). In an opinion dated October 4, 1997, the ALJ found plaintiff had failed to carry her burden to prove that she could not return to her job as a cook's helper, and he denied the request for benefits. Plaintiff unsuccessfully sought review from the Appeals Council, and she timely filed suit in this court. The case is now ripe for review.

In determining disability, the Commissioner, through the ALJ, works through a five-step sequential evaluation process.[1] The burden rests upon the plaintiff throughout the first four steps of this five-step process to prove disability, and if the plaintiff is successful in sustaining her burden at each of the first four levels then the burden shifts to the Commissioner at step five.[2] First, plaintiff must prove she is not currently engaged in substantial gainful activity.[3] Second, the plaintiff must prove her impairment is "severe" in that it "significantly limits her physical or mental ability to do basic work activities . . . ."[4] At step three the ALJ must conclude the plaintiff is disabled if she proves that her impairments meet or are medically equivalent to one of the impairments listed at 20 C.F.R. Part 404, Subpart P, App. 1, §§ 1.00-114.02 (1999).[5] Fourth, the plaintiff bears the burden of proving she is incapable of meeting the physical and mental demands of her past relevant work.[6] If the plaintiff is successful at all four of the preceding steps

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[1]*See* 20 C.F.R. § 416.920 (1999).

[2]*Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991).

[3]20 C.F.R. § 416.920(b) (1999).

[4]20 C.F.R. § 416.920(c) (1999).

[5]20 C.F.R. § 416.920(d) (1999). If a claimant's impairment meets certain criteria, that claimant's impairments are "severe enough to prevent a person from doing any gainful activity." 20 C.F.R. § 416.925 (1999).

[6]20 C.F.R. § 416.920(e) (1999).

the burden shifts to the Commissioner to prove, considering plaintiff's residual functional capacity, age, education and past work experience, that she is capable of performing other work.[7] If the Commissioner proves other work exists which the plaintiff can perform, the plaintiff is given the chance to prove that she cannot, in fact, perform that work.[8]

Following plaintiff's hearing in this case, the Commissioner, acting through the ALJ, concluded that plaintiff was not disabled within the meaning of the Act. The ALJ did find that although plaintiff's condition was not the same as or equivalent to a listed impairment, the following impairments were severe: depressive disorder, not otherwise specified; seizure disorder; and passive dependent/passive aggressive personality. (R. at 19.) The case was decided at step four because the ALJ found plaintiff had failed to prove that her residual functional capacity was such that she was precluded from returning to her past relevant work as a cook's helper. (R. at 12-20.) In the ALJ's opinion, plaintiff had no exertional limitations whatsoever, but she could not work around heights or moving machinery. (R. at 19.) Because plaintiff's job as a cook's helper did not require her to work around heights or machinery, plaintiff could return to that job; thus, she was not disabled.

The court considers on appeal whether the Commissioner's final decision is supported by substantial evidence, and whether the Commissioner used the correct legal standard. *Muse v. Sullivan*, 925 F.2d 785, 789 (5th Cir. 1991); *Villa v. Sullivan*, 895 F.2d 1019, 1021 (5th Cir. 1990). "To be substantial, evidence must be relevant and sufficient for a reasonable mind to accept it as adequate to support a conclusion; it must be more than a scintilla but it need not be a

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[7]20 C.F.R § 416.920(f)(1) (1999).

[8]*Muse*, 925 F.2d at 789.

preponderance . . . ." *Anderson v. Sullivan,* 887 F.2d 630, 633 (5th Cir. 1989) (citation omitted). "If supported by substantial evidence, the decision of the [Commissioner] is conclusive and must be affirmed." *Paul v. Shalala,* 29 F.3d 208, 210 (5th Cir. 1994) (citing *Richardson v. Perales,* 402 U.S. 389, 390, 28 L.Ed.2d 842 (1971)).

The only evidence of physical limitation that is contained in the record is that of Dr. Kenneth J. Gaines. Dr. Gaines performed a neurologic consultative evaluation on September 6, 1996, and he noted that plaintiff likely had a post-traumatic seizure disorder. (R. at 128.)[9] Dr. Gaines did not conclude that plaintiff was disabled, however, and only recommended that plaintiff not work around heights or heavy machinery. (R. at 128.) Remarkably, Dr. Gaines questioned plaintiff's claims of three seizures per day and resulting headaches because he believed such claims were "excessive." (R. at 128.) Aside from these findings, the only evidence of record to support plaintiff's claim of disability is her reduced intellectual functioning and other mental maladies.

Plaintiff's argues, first, that the ALJ failed to consider the entire record and based his decision on "isolated bits of information from it" instead. Although the case that plaintiff cites in support of this proposition deals more directly with the court's obligation to consider the record in its entirety on appeal than with the ALJ's obligation at the administrative level, *Singletary v.*

[9]Plaintiff's history of possible seizure activity possibly relates back to an incident in 1980 when she was struck in the head with a shotgun. (R. at 127.) However, it may only date back to 1995, when plaintiff was treated at Hillcrest Hospital after she fell during an argument and began foaming at the mouth and staring into space, typical seizure activity. (R. at 134.) Plaintiff went from Hillcrest to Baptist Memorial Hospital, North Mississippi, where Dr. Thomas L. Windham diagnosed her with probable seisure disorder. (R. at 121.) Nevertheless, a head CT scan was normal, and an MRI and electroencephalogram were unremarkable except to show some left mastoid edema. (R. at 121.) Plaintiff was prescribed Dilantin upon discharge on October 11, 1995. (R. at 121.)

Bowen, 798 F.2d 818 (5th Cir. 1986), it is true that the ALJ may not make a "selective reading" of the record or otherwise give weight to some portions of the record and ignore others without a sufficient reason for doing so. *See* 4 SOCIAL SECURITY LAW AND PRACTICE § 53:11 (Timothy E. Travers et al. eds., 1994). Plaintiff argues that the ALJ failed to give sufficient weight to the opinion of Dr. Charles S. Small that plaintiff was "unreliable" and to Dr. Eldridge E. Fleming's opinion that plaintiff's seizure disorder adversely affected her mental functioning.

Plaintiff's position concerning Dr. Small is that the ALJ adopted parts of his opinion, *e.g.*, his diagnosis of passive dependent/passive aggressive personality, (R. at 19, 154), but the ALJ must have excluded Small's indication that plaintiff's ability to demonstrate reliability was poor, (R. at 157), because the ALJ's opinion failed to mention this conclusion.[10] It is plaintiff's counsel's position that plaintiff's unreliability makes her unemployable because she is apt to miss work or be untrainable and unable to remember instructions, use judgment, respond to supervision and perform other "basic work activities" as defined in 20 C.F.R. § 416.921 (1999).

With regard to Dr. Fleming, plaintiff contends that the ALJ discounted his early findings from April 1997, and the Appeals Council misinterpreted the report and assessment Fleming submitted following the ALJ's decision. Dr. Fleming noted in 1997 that testing revealed plaintiff to be functioning "below the -2 ½ standard deviation level and below the 5th percentile," which indicated she was "severely limited." (R. at 150.) Fleming later reviewed the ALJ's decision and submitted a report indicating that the ALJ may have misinterpreted the evidence in the record in finding plaintiff was not disabled. (R. at 171.) Fleming further stated that "[t]he

[10]Plaintiff's argument is somewhat confusing, however, as the ALJ *did* in fact make note of Dr. Small's finding that plaintiff "had a poor ability to demonstrate reliability" in his opinion. (R. at 15.)

combination of seizure disorder, low intellectual functioning, and functional illiteracy make vocational placement for Ms. Edmond practically impossible." (R. at 171.)

In response to plaintiff's argument, defendant counters that the ALJ did in fact consider the record as a whole and relied upon the portions of the records from Drs. Small, Fleming and Michael Whelan that were consistent. Specifically, all three doctors questioned plaintiff's motivation to some extent. At Dr. Whelan's examination in December 1995, plaintiff exhibited a verbal IQ of 51, a performance IQ of 55 and a full scale score of 48. (R. at 118.) Based upon his questioning of the plaintiff, Whelan stated that "[i]t is clear to me the claimant is malingering." (R. at 118.) He finally concluded that plaintiff "probably has an IQ near 70 if she would put forth the effort to generate a valid I.Q." (R. at 119.) Similarly, Dr. Fleming noted that plaintiff "did not give a good effort" during one of the tests that he administered. (R. at 150.) Dr. Small estimated plaintiff's IQ to be in the borderline range, (R. at 153), but he noted that plaintiff "does not appear to be very well motivated or trying hard today." (R. at 154.)

What strikes the court, however, is another consistency among the reports of Drs. Whelan, Fleming and Small. All three doctors indicated that plaintiff reported to have experienced a seizure prior to the tests they administered. (R. at 119, 150, 152.) Dr. Fleming clearly intimates in both of his reports that plaintiff's seizure activity would likely have had a negative effect on the validity of her testing. (R. at 150, 170-71.)[11] Instead of following up on

[11]The defendant did not raise the issue of whether the court should consider the information submitted to the Appeals Council where its conclusion was that there was no basis for review of the ALJ's decision. (R. at 4-5.) The Sixth Circuit has held that evidence submitted to the Appeals Council does not actually become part of the administrative record, and the court cannot consider it in reversing the ALJ's decision, but must instead determine whether the evidence is "new" and "material" and "good cause" existed for failure to submit it to the ALJ. *Casey v. Secretary of Health & Human Services*, 987 F.2d 1230, 1233 (6th Cir. 1993). The Eighth Circuit

the fact that plaintiff's test scores may have been less than conclusive because of her medical condition, however, the ALJ simply focused on the physicians' doubts about plaintiff's effort during testing and concluded that plaintiff did not have an impairment that met or equaled either listing 12.05B or C.[12] Under listing 12.05 of 20 C.F.R. Part 404, Subpart P, App. 1, plaintiff would be presumptively disabled if she presented evidence of either

> B. A valid verbal, performance, or full scale IQ of 59 or less;
> OR
> C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function . . . .

Plaintiff presented evidence of IQ scores between 48 and 55, (R. at 118), and Dr. Whelan opined that plaintiff *might* be able to score in the 70 range if she tried harder. (R. at 119.) Admittedly, the scores are of questionable validity, and the demands of the listings are stringent and demanding, *see Falco v. Shalala*, 27 F.3d 160, 162 (5th Cir. 1994); nevertheless, it appears clear to the court that the ALJ erred in rendering a decision that plaintiff was not disabled in the face of

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has held to the contrary, however, and stated that evidence submitted to and considered by an Appeals Council, which ultimately denies review, "is to become part of what we will loosely describe here as the 'administrative record,' even though the evidence was not originally included in the ALJ's record." *Nelson v. Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992). The Second Circuit has considered the issue, noted that the circuits are split, and adopted the reasoning of the Eighth Circuit in *Nelson*. *Perez v. Chater*, 77 F.3d 41, 44-46 (2nd Cir. 1996). In this case, however, even if the court were to follow the Sixth Circuit and find that Fleming's second report, (R. at 170-74), was not to be considered as part of the actual record, the court would still be inclined to find a "reasonable possibility" that the evidence would likely have changed the outcome at the ALJ level and remand for consideration of Fleming's report and assessment and for receipt of further evidence. *See Lovings v. Commissioner*, 914 F. Supp. 1432, 1433 (E.D. Tex. 1995).

[12]"If a claimant's impairment is in the Listing of Impairments or is found to be equivalent ot a listed impairment, this raises the presumption of disability that makes further inquiry into work ability unnecessary." *Selders v. Sullivan*, 914 F.2d 614, 619 n.1 (5th Cir. 1990) (citing *Sullivan v. Zebley*, 493 U.S. 521 (1990)).

such evidence.

The court is well aware that, under the Social Security Act, the burden to prove disability rests upon the claimant. *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). Under the Social Security regulations, "if sufficient medical or other evidence is not provided by the claimant, the secretary is required to make a decision based on the information available." *Pearson v. Bowen*, 866 F.2d 809, 812 (5th Cir. 1989) (citation omitted); *see* 20 C.F.R. § 416.916 (1999). In some cases, the ALJ may require additional consultative examinations, provided for in 20 C.F.R. § 416.917 (1999), in order to make an informed decision on the basis of a "full and fair record." *Pearson*, 866 F.2d at 812 (citation omitted). The decision to order further testing at government expense is discretionary with the ALJ, and it is only called for when "such an examination is *necessary* to enable the administrative law judge to make the disability decision." *Id.* (citation omitted) (emphasis in original). "[A] claimant must 'raise a suspicion concerning such an impairment necessary to require the ALJ to order a consultative examination to discharge his duty . . . .'" *Id.* (citation omitted). In the case before the court, however, the court concludes that there was just such a suspicion in light of plaintiff's physical history and her unusual test results.[13] Failure to take steps to acquire valid testing of plaintiff's mental and intellectual

[13]The court is not swayed by defendant's contention that the evidence regarding plaintiff's questionable effort during testing "illustrates that it is impossible to obtain accurate testing of plaintiff's intellectual functional capacity . . . [and] additional I.Q. testing was entirely unnecessary and would prove useless in this case." The ALJ recognized that there is evidence in the record which tends to show that plaintiff has some form of seizure disorder. (R. at 15.) There is also evidence that plaintiff experienced seizures on all three of the dates she appeared before the examining psychologists. However, the ALJ recognized that plaintiff's condition is ameliorated when she is on Dilantin, although there is evidence that she has been noncompliant with her medication regimen. (R. at 18, 48-50.) It appears to the court that the necessary preconditions to valid intelligence testing are all available here, *e.g.*, a physical condition that can

functioning was reversible error, and the court finds that the decision of the Commissioner should be reversed and this case remanded for further proceedings in light of these findings. A separate final judgment in accordance with this opinion shall issue this day.

This the 23rd day of August 1999.

UNITED STATES MAGISTRATE JUDGE

be controlled with medication such that IQ test scores will either be valid or will clearly be the result of mere malingering instead of seizure activity. On that basis, additional testing – *valid* testing – is not an impossibility.

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FINAL JUDGMENT

In accordance with the memorandum opinion issued this day,

It is, hereby,

ORDERED:

That the decision of the Commissioner is reversed, and this case is remanded to the Commissioner of Social Security for further proceedings.

SO ORDERED AND ADJUDGED, this the 23rd day of August 1999.

UNITED STATES MAGISTRATE JUDGE